Number 14538

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN J. SAMPSON, CHIEF of the SWINOMISH TRIBE OF INDIANS,

Appellant,

vs.

JOSEPH JOE, et al, as members of the Senate of the Swinomish Indian Tribal Community, A Federal Corporation,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington Northern Division

PETITION FOR RE-HEARING OR HEARING EN BANC

MALCOLM STEWART McLEOD
617 Dexter Horton Bldg.
Seattle 4, Washington

JOHN E. BELCHER
1201 Northern Life Tower
Seattle 1, Washington

Attorneys for Appellant

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PETITION FOR RE-HEARING OR HEARING EN BANC

On oral argument of this case at San Francisco on February 17, 1955, which was so interrupted, from time to time, by Presiding Judge Mathews, that both parties were unable to properly express their views. Judge Mathews stated that *the record had not been read, nevertheless* the opinion was orally expressed by him that the only *written order* from which this appeal was taken is an order denying the appointment of a temporary receiver. That was only *one* order. *There was another order in the handwriting of the district*

judge made on the face of our proposed findings and conclusions and signed by him which we believe constitutes a "Written order" denying *injunctive relief.* Aside from the "colloquay" referred to in the opinion (p. 4) that order reads:

> *"On the 30th day of July 1954 the foregoing requested findings of fact and conclusions of law were tendered for approving and entering to the undersigned judge who respectfully declined to approve, make or enter the same* (signed John C. Bowen, Judge)"

This will be found in the record at page 40 (15) and is quoted in full at page 39 of our opening brief.

An examination of the record will show that these proposed findings are adequately supported by the undisputed evidence in the case. This is spelled out in detail at pages 38 and 42 of our opening brief, with appropriate references as to where the evidence in support of the respective proposed findings will be found in the record.

It is true there was no request for, nor any mention of injunctive process or injunctive relief in the motion for an order to show cause or in the order to show cause itself but the motion for the show cause order which was based on the complaint constitutes a pleading—which show cause order was answered by appellees who themselves brought into the hearing the tribal court judgment based entirely on the allegations

of the *amended* complaint. This Tribal Court judgment pleaded for the first time in the amended complaint was admitted on the hearing of the order to show cause. By the provisions of Rule 15(b) Rules of Civil Procedure the pleadings were deemed amended to conform to the proof. This court has recognized that rule. In *Nester v. Western Union*, 196 F 2d 587, cited at p. 48 of our opening brief. The conclusion reached by this honorable court that:

> ". . . the *oral statement* that all requests for interlocutory injunctive relief were denied *were meaningless.*"

is therefore hardly correct when considered in connection with the handwritten refusal of the district court *to make a finding concerning the tribal court judgment.* (R 40 (15).

In the footnote at page 2 of the opinion it is stated: "The order of July 30, 1954 was a *written order* filed and entered on that date."

The endorsement of refusal to enter our proposed finding and conclusion was also a written order. It is in the handwriting of the district judge and *was made the same date* as the *typewritten order* and bears the *signature of the district judge.*

At the time of oral argument Judge Mathews expressed the opinion that *no issue with respect to the Tribal Court judgment* (Ex. 4) *was raised by appel-*

lees until the answer was filed on August 24, 1954. According to the record *that is not correct.*

The return to the order to show cause was *made and filed after the filing and serving of the amended complaint* which pleaded the tribal court judgment, and long before the belated answer was filed.

Appellees return to the order to show cause is contained in the affidavit of Tandy Wilbur, Sr. (R. 146). That affidavit brought in issue the tribal court judgment which we sought to have enforced. This is what that return states:

> "The Swinomish Indian Court has jurisdiction in civil matters only to hear suits wherein the defendant is a member of the tribe and non-members when brought on by stipulation. The Indian Tribal Community never submitted to the jurisdiction of the Sminomish Indian Court, and at all times contended and still does contend that such court does not have jurisdiction to hear disputes between different tribes, that is, does not have jurisdiction to hear the claim of the plaintiff herein on behalf of the Swinomish Tribe of Indians against the Swinomish Tribal Community. The Swinomish Indian Tribal Community is not a member of itself, but a separate organization. There was no stipulation that the matter could be heard by the Swinomish Court." (amended affidavit of Tandy Wilbur, Sr., dated June 10, 1954—R. 146.)

This part of the affidavit, filed as a return to the show cause order, *was in response to nothing but the allegations of the amended complaint, which pleaded*

the tribal court judgment two months before appellees answer to the amended compaint was filed.

The *prayer* of the *amended* complaint is:

1. That an order be entered herein, directing the defendants to *forthwith comply with the judgment of the tribal court* entered on the 8th day of July 1953.
2. *Enjoining defendants* and each of them, or said *corporation from exercising any control whatever over the property owned by the Swinomish Tribe.*"

Quite properly then, the district court received evidence *on that issue* and was in duty, bound to make a finding with respect thereto which he "respectfully declined to approve, make or enter * * *" (R. 40 (15)

Injunctive relief was sought and prayed for in the *amended* complaint, and as stated in our opening brief (p. 47) the return by defendants, in affidavit form, to the order to show cause *injected the issue of the validity of tribal court judgment* (Ex. 4). See affidavits of Tandy Wilbur (R. 146) even though *not referred to in the motion for or the order to show cause.* All parties, including the district judge, treated the motion and order to show cause as amended *by the amended complaint.* Evidence was offered and admitted concerning *this tribal court judgment* (Ex. 4 Tr. p. 71—Opening brief—pp. 26 and 27). All parties, including the district judge, treated this motion and

order to show cause *amended to conform to the proof* in accordance with the well recognized rule (Rule 15(b) and under the decisions of this honorable court, set out at pp. 48½ and 49 of our opening brief.

This court assumed that because the answer of appellees was not filed until after the order of refusal of a finding on the issue as to the validity of the tribal court judgment the tribal court judgment was not before the district court.

That assumption is *incorrect.* The issue was brought about by appellees return to the order to show cause by Tandy Wilbur, Sr. The specific language used being:

> "The Indian Tribal Community never submitted to the jurisdiction of the S w i n o m i s h Indian Court."

Of course, this is refuted by the documentary evidence attached to the deposition of Raymond Bitney (R. 222-232).

It is stated in the opinion filed February 28, 1955 —eleven days after oral argument—that: "The complaint prayed that appellees be removed from office and required to account for all funds coming into the corporation's possession since 1948 and *for all funds collected by appellees for the sale of timber belonging to the tribe or its individual allottees.*" Neither the

original or the *amended* complaint made particular mention of the sale of timber. Both related to ownership of fish traps, oyster beds and saw-mill properties, which were ordered by the Tribal Court returned to the tribe—the sale of the timber was only incidental.

The opinion in this case sets up a "straw-man" and then proceeds to knock him down, by the process of treating the show cause order as based on the allegations of the original complaint alone when in fact, the return made by appellees to the order to show cause brought in issue the additional allegations contained in the *amended complaint which does pray for injunctive relief.* In the affidavit of Tandy Wilbur (R. 146) the appellees themselves *injected the issue of the validity of the tribal court judgment* in the words set out at p. 6 hereof.

The documentary evidence in the form of an exemplified copy of the tribal court judgment having been admitted in evidence (Ex. 4), the motion for the order to show cause and the order to show cause itself are, under repeated dicisions of this court set out at pages 48½ and 49 of our opening brief, deemed *amended to conform to the proof.*

In the footnote 3, page 3, of the opinion it is stated: "Furthermore, the hearings of June 7, June 11, July 15, July 27 and July 30, 1954, were hearings on the order to show cause and were not hearings on the amended complaint, *nor was the amended*

complaint mentioned in the order appealed from."

The italicized portion of the above quotation is precisely what appellant is complaining about on this appeal because the allegation of the amended complaint concerning this tribal court judgment (R. 26, 27), was made an issue by appellees, proof of which was offered and admitted (Vol. 1, p. 68) and a certified copy of the judgment was admitted in evidence as Ex. 4 (Tr. Vol. 1, p. 75).

Although requested by appellant the district court in his own handwriting and over his signature *"respectfully declined to approve, make or enter"* a finding or conclusion in respect to the tribal court judgment and order (R. 40 (15).

This is covered by our assignment of error (or point on appeal) numbered IX (R. 40 (21) (Opening brief p. 44).

It is a rule of universal application that a trial court make findings of fact on *all matters in issue.*

Mayo v. Lakehead Highlands Canning Co., 308 U.S. 310, where it was held that a full and fair compliance with this rule is of the highest importance to a proper review of an order granting or *refusing* a preliminary injunction.

This court in *Pacific American Fisheries v. Mul-*

laney (1951), 191 F. 2d 137, made a similar ruling.

This the district court did not do. A request must be made in the trial court for additional findings. This we did, in our proposed findings which were *refused in writing* (R. 40 (15) over the signature of the district judge.

Therefore, to say that because the hearings on June 7, June 11, July 15, July 27 and July 30, 1954 were hearings on the order to show cause and were not hearings on the amended complaint, nor was the amended complaint mentioned in the order appealed from is substituting form for substance.

In territorial days, this precise question arose in 1882 in the case of *Eakim v. McCraith et al*, 2 Washington Territory Reports 112. Chief Justice Greene, speaking for the territorial court, First Judicial District, sitting at Walla Walla in the then Territory of Washington said:

> "The Judge's findings of fact are so meager, that they *do not cover all of the material issues made by the pleadings.* His conclusion of law, therefore, does not flow as a logical sequence from the facts found. But if advantage was to be taken of this, there should have been a motion addressed to the court below to make additional findings to *meet the omitted issues.*"

The appellant did request a finding on the issue of the tribal court judgment, a certified and exemplified

copy of the tribal court judgment was admitted in evidence as Ex. 4 (Tr. p. 71).

The validity or invalidity of the tribal court judgment is only one phase of the case and poses nothing but a pure question of law, the fact of its entry being conceded, but its *validity only* being questioned.

The other phase of the case has to do with an accounting and is therefore the part of the case dealing with facts, which can only be determined after a trial on the merits. The accounting poses questions of fact. An accounting of course, just as the district court stated, will consume considerable time. The legal phase must be determined at the outset before an accounting can be ordered and that involves the legal question as to whether or not this tribal court judgment is entitled to full faith and credit in the United States Courts.

The findings which the trial court was requested by appellant to make and which he, in writing refused to approve or enter, are as follows:

> "That certain industries are located on the Swinomish Reservation, to-wit: fish traps, oyster beds and a saw-mill and at La Conner, Washington, adjacent to the said reservation, a plant for the processing of oysters, which has not been operated since early in 1952 because of the failure of the Swinomish Tribal Community to comply with the regulations of the Washington State Department of Health by making changes and alterations in sanitation in said plant in order

> to comply with said State sanitary regulations, all of which industries have been operated by the Swinomish Indian Tribal Community." (proposed finding VI—R.. Vol. 3, p. 8).

(This proposed finding is supported by the affidavit and testimony of Martin J. Sampson (Tr. pp. 81 R. 65, 66) and the affidavits of Mondalla (R. 102) and Girard (R. 71).

> "The court finds from the evidence that in 1951 a controversy arose between the Swinomish Tribe of Indians and the defendants herein constituting the Senate of the Swinomish Indian Tribal Community, a corporation, as to the ownership of the several industries being operated by said corporation, and an action was instituted in the Tribal Court and a hearing was had at which evidence was adduced after which the judge of the tribal court determined that the industries operated by the Swinomish Indian Tribal Community were owned by the Swinomish Tribe of Indians and on July 8, 1953, said Tribal Court made and entered an order and judgment requiring the Swinomish Indian Tribal Community to '*immediately return to and turn over all property*, monies wheresoever held, books of account, records to the council of the Snohomish Tribe.'
>
> "The court further finds that no appeal was taken by the Swinomish Indian Tribal Community although appeal procedure is provided for in the tribal code." (R. Vol. 3, p. 8).

(This proposed finding is supported by a certified copy of the judgment in evidence as Exhibit 4, the deposition of Raymond H. Bitney, Superintendent Western Washington Indian Agency (R. 222-233) and

is admitted by appellees in the affidavit of Tandy Wilbur Sr. (R 146) who merely claims lack of jurisdiction in the tribal court to enter such judgment).

This is all fully set out at pages 39, 40 and 41 of our opening brief.

If it can be judicially said that the endorsement by the District Court *in his own handwriting and over his signature* on the same day and at the same time he signed the *typewritten order on the 30th day of July 1954* is not *a refusal after a request*, to make a finding on one of the issues litigated then, of course such endorsement, to use the language of Judge Mathews with respect to the district court's *oral ruling* which the court is pleased to term "colloquay" then this writing by the district court, in his own hand-writing over his signature is "meaningless."

We do not believe it is meaningless' and on reconsideration, we do not believe this court will say so.

This *refusal*, we submit, requires a careful examination of the record, and if, upon such examination of the record it is found that this tribal court judgment *was* in issue on the several hearings on the order to show cause, then the district court was required under the rule to make a finding one way or the other on that issue. Failure to do so constitutes error and requires reversal—not dismissal of the appeal.

Under all authority it was error for the district court to refuse to do so and the case should at least be remanded with directions to make a specific finding on that issue instead of dimissing the appeal.

The purpose of Rule 52 (a) is to make definite just what is decided by the case in order to apply the doctrines of estoppel and res judicata in future cases. *Nordby* 1 Frd, 25. See also Advisory Committee note to amendment to Rule 52 (a).

The typewritten order of July 30, 1954 disposed of only one phase of the relief sought—the denial of the receivership sought solely *because of the emergency*—the approach of the fishing season to prevent further dissipation of the earnings of the fish traps. (See affidavit attached to motion) which it is well known is not appealable and does not require findings, while the *handwritten* order bearing the same date and signature of the judge *refusing* the proposed or a substitute finding concerning one of the vital issues in the case—the tribal court judgment—which constituted the only phase of the case from which appeal to this court is authorized (is appealable).

Because this refusal was not included in the typewritten order although requested by appellant and was dealt with in the handwriting of the district judge in a separate document—our proposed finding—it seems

to us is substituting form for substance. *The notice of appeal was from the order denying injunctive relief,* which in effect is what the district court did by his endorsement in his own handwriting and over his signature on the proposed finding and conclusion of law which he "respectfully *declined to approve, make or enter.*"

As said by this court in *United States* v. *Foster* (9 Cir. 194) 123 F 2d 32:

> "An appellant seeking to overthrow the findings has burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."

This, we respectfully submit, we have done as an examination of the record will clearly show.

And as pointed out in our assigments of error the findings made by the district court that the corporation is the owner of and entitled to the beneficial use of these seasonal industries is clearly erroneous, in the light of the tribal court judgment.

This court has held that Rule 52 (a) permits the unsuccessful party to raise on appeal the question of the sufficiency of the evidence to support findings whether or not the party raising the question has made in the district court an objection to such finding *or has made a motion to amend* or motion for judgment.

Bingham Pump Co. v. *Edwards* (9 Cir.) 118 F

2d, 338 certiori denied 62 S Ct. 107, 314 US 656, 68 L Ed. 525.

Monaghan v. Hill (9 Cir.) 1944, 140 F 2d. 31.
In re Imperial Irr. Dist. 38' F Supp. 770, affirmed 136 F 2d. 539 (cert. den, 64 S Ct. 184, 321 US 787, 88 L Ed. 1078 re-hearing den. 64 S Ct. 940, 322 US 767, 88 L Ed. 1593.

"An objection in the appellate court which would dispose of a cause upon a technicality in pleading is not to be favored in view of Rule 8 (f) and 15, especially where if the objection had been made below, the plaintiff might have amended his complaint so as to obviate the objection."

Mitchell v. Wright (9) Cir. 1946 154 F 2d. 925.

This show cause order was not heard on oral testimony, but on *affidavits*. In such a case this court held that the reviewing court gives slight weight to the findings.

Equitable Life Assur. Soc. of U.S. v Irelan (9 Cir.) 1941—123 F 2d. 462.

For the reasons herein set forth and to prevent a miscarriage of justice we earnestly and respectfully petition this honorable court for a reconsideration and rehearing or a hearing en banc on the record made.

Respectfully submited,

MALCOLM STEWART McLEOD
and
JOHN E. BELCHER
Attorneys for Appellant.

617 Dexter Horton Building
Seatle 4, Washington

Certificate

John E. Belcher, one of counsel for appellant hereby certifies that in his professional judgment this petition herein is well founded and that it is not interposed for delay, but to prevent a miscarriage of justice.

Dated this 11th day of March, 1955.

One of Counsel for Appellant